

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JESUS WHITE TAPIA,

Plaintiff,

vs.

M. STERKEL, BOB GUSER, and  
W. MICHAEL SUESEY,

Defendants.

NO. CV-05-3010-MWL

ORDER ADOPTING REPORT AND  
RECOMMENDATION TO DISMISS FIRST  
AMENDED COMPLAINT WITHOUT  
PREJUDICE

By Order filed April 22, 2005, the court advised Plaintiff of the deficiencies of his First Amended Complaint and directed him to amend or voluntarily dismiss within thirty (30) days. Specifically, the court noted Plaintiff's claims against M. Sterkel of the Washington State Patrol based on Plaintiff's arrest were precluded by *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). Plaintiff also failed to allege facts demonstrating an excessive risk to his health or safety against Defendant Suesey. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Furthermore, his assertions of *respondeat superior* liability against Defendant Guser were not cognizable under 42 U.S.C. § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Although granted the opportunity to do so, Plaintiff has failed to file an amended complaint setting forth facts sufficient to state a

ORDER ADOPTING REPORT AND RECOMMENDATION TO DISMISS FIRST AMENDED  
COMPLAINT WITHOUT PREJUDICE -- 1

1 claim upon which relief may be granted. For the reasons stated above  
2 and in the previous Orders, the Court adopts in its entirety the  
3 magistrate judge's report and recommendation (Ct. Rec. 13) that  
4 Plaintiff's complaint be dismissed without prejudice under 28 U.S.C.  
5 §§ 1915(e)(2) and 1915A(b)(1). Accordingly,

6 **IT IS HEREBY ORDERED** that Plaintiff's First Amended Complaint is  
7 **DISMISSED WITHOUT PREJUDICE**. Such dismissal counts as a dismissal  
8 pursuant to 28 U.S.C. § 1915(g).

9 **IT IS SO ORDERED**. The District Court Executive is directed to  
10 enter this Order and forward copies to the parties.

11 **DATED** this 17th day of June, 2005.

12  
13 s/ Fred Van Sickle  
14 Fred Van Sickle  
Chief United States District Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27